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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1960

No. 627

PENNSYLVANIA TURNPIKE COMMISSION,

Petitioner

v.

STANLEY GERR and CARL GERR, a Minor, by STANLEY GERR, His Guardian,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your petitioner, Pennsylvania Turnpike Commission, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court to review the decision of the United States Court of Appeals for the Third Circuit rendered on October 10, 1960, which reversed the judgment of the United States District Court for the Middle District of Pennsylvania dismissing the respondent's action.

OPINION AND ORDERS BELOW

The Memorandum and Order of the United States District Court for the Middle District of Pennsylvania entered October 20, 1959 is set forth in the record (R. 11a). The Order and Judgment of the United States District Court for the Middle District of Pennsylvania entered November 24, 1959 is set forth in the record (R. 16a).

The Opinion of the United States Court of Appeals filed October 10, 1960, is set forth in the record and is printed in the Appendix (Appendix pp. 24-33).

JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit was filed on October 10, 1960.

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by 62 Stat. 928, 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Rules of Decisions Act, 62 Stat. 944, 28 U.S.C.A. §1652, the Court of Appeals was bound to follow a series of decisions of Courts of Common Pleas of the Commonwealth of Pennsylvania holding the Pennsylvania Turnpike Commission immune from tort liability for personal injuries.

2. Whether the General Assembly of Pennsylvania can restrict actions against the Pennsylvania Turnpike Commission to the Dauphin County Courts.

STATUTES INVOLVED

The Rules of Decision Act, 62 Stat. 944, 28 U.S.C. 1652 provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Act of the General Assembly of the Commonwealth of Pennsylvania approved May 16, 1940, P. L. (1941) 949 5, 36 Purdon's Statutes §653d entitled "Pennsylvania Turnpike Philadelphia Extension Act", provides:

> "The exercise by the commission of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be an essential governmental function of the Commonwealth."

The Act of the General Assembly of the Commonwealth of Pennsylvania approved May 16, 1940, P. L. (1941) 949, §6(c), 36 Purdon's Statutes §653c(c), entitled "Pennsylvania Turnpike Philadelphia Extension Act", provides:

> "The commission may sue and be sued in its own name, plead and be impleaded: Provided, however, That any and all actions at law or in equity against the commission shall be brought only in the proper courts at the county of Dauphin."

STATEMENT OF THE CASE

This action arose from the collision of a vehicle operated by Harry William Emrick with the rear of a vehicle operated by Carl Gerr on October 10, 1955 on the Philadelphia Extension of the Pennsylvania Turnpike in the Middle District of Pennsylvania. The collision caused the vehicle operated by Carl Gerr to leave the Turnpike and overturn. On November 27, 1956, a complaint was filed in the United States District Court for the Middle District of Pennsylvania, alleging that the plaintiffs, Carl Gerr, a minor, and his father and guardian, Stanley Gerr, were citizens of the State of Connecticut, that the defendant Pennsylvania Turnpike Commission was a citizen of the Commonwealth of Pennsylvania and that the amount in controversy, exclusive of interest and costs, exceeded $3,000.00. The jurisdiction of the District Court was based on diversity of citizenship between the plaintiffs and the Pennsylvania Turnpike Commission.

The Complaint alleged that the Pennsylvania Turnpike Commission was negligent in failing to maintain a guard rail at the place where the vehicle operated by Carl Gerr left the Turnpike.

The Pennsylvania Turnpike Commission filed an answer raising the defense that the complaint failed to state a claim upon which relief could be granted against the Commission.

The Plaintiffs filed a Motion to hear and determine that defense before trial in accordance with Federal Rules of Civil Procedure, Rule 12(d).

After hearing argument the District Court wrote a Memorandum and Order dated October 20, 1959, sustaining the defense and dismissing the action against the Pennsylvania Turnpike Commission. On November 24, 1959 in an Order and Judgment in accordance with Federal Rules of Civil Procedure, 54(b), the District Court determined that there was no just reason for delay in entering final judgment and entered final judgment dismissing the Complaint as to the Pennsylvania Turnpike Commission.

On appeal, the Court of Appeals reversed the decision of the District Court and remanded the cause to the District Court for proceedings not inconsistent with the Opinion of the Court of Appeals. The Court of Appeals held that there was not such a consensus of opinion among the Courts of Common Pleas of the Commonwealth of Pennsylvania as to require the Federal Courts to follow those decisions uniformly denying the tort liability of the Pennsylvania Turnpike Commission.

In concluding that the Commission is liable in tort for personal injuries, the Court of Appeals examined various decisions of the Supreme Court of Pennsylvania and stated that it was of the opinion that the Supreme Court of Pennsylvania would so rule if the question were presented. The Court of Appeals also held that under Section 6(c) of the "Pennsylvania Turnpike Philadelphia Extension Act" the United States District Court for the Middle District was one of the "proper courts at the county of Dauphin" in which suit could be maintained against the Commission. The Court of Appeals did not determine whether or not the Commonwealth could restrict suits against the Commission to the Dauphin County Courts.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the law of Pennsylvania.

By holding the Pennsylvania Turnpike Commission liable in tort for personal injuries, the Court of Appeals has decided an important question of Pennsylvania law in a way in conflict with the applicable Pennsylvania law as announced by the Courts of Common Pleas of Pennsylvania. If recovery is allowed by the Federal Courts in this situation in which Pennsylvania State Courts have uniformly denied recovery, the accident of diverse citizenship will become the determining factor contrary to the Rules of Decision Act as interpreted and applied by *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) and subsequent cases of this Court.

The decision by the Court of Appeals that the Commission is subject to liability in tort for personal injuries will result in the institution of much future litigation in the Federal Courts and the imposition of a lasting and serious financial burden on the Commission, which was not contemplated by the General Assembly in the formation of the Pennsylvania Turnpike Commission. This Court should grant certiorari to eliminate the conflict between the Federal and state courts on this important question of Pennsylvania law.

Reasons for Granting the Writ

(a) *All Pennsylvania cases directly in point have uniformly held that the Pennsylvania Turnpike Commission is immune from tort liability for personal injuries.*

Since 1942 the Courts of Common Pleas of Pennsylvania have repeatedly held the Commission immune from tort liability for personal injuries. The case of *House and Frye v. Pennsylvania Turnpike Commission*, 53 Dauphin County Rep. 38 (1942), involved an action to recover damages sustained by the plaintiffs as the result of the negligence of an employee of the Commission. The Commission filed an affidavit of defense contending that, as an instrumentality of the Commonwealth, it was not liable for the torts of its agents. The Court discussed the various provisions of the Act of May 21, 1937, P. L. 774, 36 P.S. 652 a-q, the original Turnpike Act, which are in substance the same as the Pennsylvania Turnpike Philadelphia Extension Act and stated at pages 41 and 42:

> "We conclude that the Pennsylvania Turnpike Commission is a quasi public corporation and, as such, is an instrumentality of the Commonwealth engaged in the performance of a particular governmental function."

and at page 43:

> "We conclude that the defendant's affidavit of defense raising questions of law must be sustained. The sole question here determined is that the Turnpike Commission, being an instrumentality of the Commonwealth, and being engaged in the performance of a governmental function, is not liable for the torts of its agents or employees under the doctrine of respondeat superior."

The holding in this case was followed by the Dauphin County Court of Common Pleas in *Malpica v. Pennsylvania Turnpike Commission*, 65 Dauphin County Rep. 302 (1953), which involved personal injuries allegedly resulting from negligence in the operation of a sand truck by employees of the Commission. The Commission filed a Preliminary Objection in the nature of a demurrer contending that the Complaint failed to set forth a cause of action against the Commission. In sustaining the Commission's demurrer the Court held at page 304:

> "It is a fundamental rule of constitutional law that a state cannot be sued without its consent: Commonwealth v. Berks County, 364 Pa. 447 (1950). Thus the Commonwealth is not liable for the torts of its officers and employees in the absence of a statute assuming or imposing such liability; and this immunity from liability for the negligence of its officers and employees extends also to agencies, instrumentalities or subdivisions of the state when in the exercise of public or governmental powers or in the performance of public or governmental duties: Brinton v. School District of Shenango Township, 81 Pa. Superior Ct. 450 (1923), and authorities there cited, pp. 451-2. Therefore, since this immunity from liability extends to the Pennsylvania Turnpike Commission as an instrumentality of the Commonwealth engaged in the performance of a particular governmental function, we hold that the preliminary objection filed in the instant case must be sustained."

In *DiRenzo v. Transamerican Freight Lines, Inc.*, 10 Pa. District and County Rep. 2d 723 (1957), President Judge Bok of Philadelphia County, now Justice Bok of the

Pennsylvania Supreme Court, held that the Commission could not be joined as an additional defendant on a personal injury suit for the reason that the Commission is immune from such suits.

The holdings of these three cases were followed in *Harrell v. Porter*, 19 Pa. District and County Rep. 2d 385 (1958), by the Court of Common Pleas of Allegheny County in wrongful death and survival actions brought against the Commission and another defendant. The Court held the Commission immune from liability for negligent acts unless liability is expressly imposed by statute on the basis of *Eyalt v. Pennsylvania Turnpike Commission*, 382 Pa. 529 (1955).

In *Super v. Pennsylvania Turnpike Commission*, 73 Dauphin County Rep. 387 (1959) an action had been brought to recover damages for injuries sustained by the plaintiffs when they fell into a ditch along the side of the Turnpike while alighting from a disabled automobile. The Court held the Commission immune from liability for personal injuries.

These five decisions, the only Pennsylvania State Court decisions which squarely rule on the question of the Commission's immunity from tort liability for personal injuries, which question was before the District Court and the Court of Appeals in this case, flatly and uniformly hold that such immunity exists.

(b) ***The Pennsylvania appellate courts have not indicated rejection of the Commission's immunity from tort liability for personal injuries.***

In concluding that the Commission is not immune from tort liability, the Court of Appeals relied heavily upon the

case of *Lichtenstein v. Pennsylvania Turnpike Commission*, 398 Pa. 415 (1960). The Supreme Court of Pennsylvania there held the Commission liable for interest on the award of viewers and expressly overruled *Pennsylvania Turnpike Commission v. Smith*, 350 Pa. 355 (1944), which held to the contrary. The Supreme Court of Pennsylvania did not deal with tort liability but confined itself to determining only that the immunity of the Commonwealth from liability for interest on an award of viewers did not extend to the Commission, and raised a question as to the validity under the Pennsylvania Constitution of a statute which would seek to deprive a property owner of interest. The Court specifically recognized that the Commission is an instrumentality of the Commonwealth performing an essential governmental function.

Two cases not discussed by the Court of Appeals merit attention. In *Ewalt v. Pennsylvania Turnpike Commission*, 382 Pa. 529 (1955), an action was brought to recover damages from the Commission for real property damaged as a result of the construction of the Western Extension of the Turnpike. The Court stated at pages 534 and 535:

> "On the basis of the foregoing, the appellee contends that the Commonwealth's immunity from liability for damages due to injuries such as are pleaded by the plaintiffs also attends the Commission since Section 4 of the Turnpike Act of May 21, 1937, P. L. 774, 36 P.S. 652(d), constitutes the Commission an instrumentality of the Commonwealth and Section 5 of the Western Pennsylvania Turnpike Extension Act of 1941, *supra*, declares that the Commission's exercise of the powers conferred by that Act in the construction, operation and maintenance of the turnpike shall be

deemed and held to be an essential governmental function of the Commonwealth. *The immunity which the appellee thus imputes to itself may be conceded.* But, that does not solve the problem which this record presents. This is not a case of injury due to an exercise of the Commission's power of eminent domain. The injury here pleaded is a continuing trespass arising out of the Commission's construction, operation and maintenance of the turnpike." (Emphasis added.)

The Court found the only basis for the imposition of liability for property damage was Section 6(k) of Western Pennsylvania Turnpike Extension Act of June 11, 1941, P. L. 104 §6(k), 36 P.S. 654c(k) which provides:

> "All public or private property damaged or destroyed in carrying out the powers granted by this act shall be restored or repaired and placed in their original condition as nearly as practicable or adequate compensation made therefor out of funds provided under the authority of this act."

Note, in this connection, the case of *Valley Forge Gardens, Inc. v. Morrissey, Inc.*, 385 Pa. 477 (1956), in which the Supreme Court of Pennsylvania recognized that liability was imposed in the *Ewalt* case, supra, only on the basis of a specific provision of the Act.

Whenever the issue of tort liability for personal injuries has arisen, the Pennsylvania State cases have held the Commission immune from such liability. The Supreme Court of Pennsylvania has recognized the liability of the Commission in eminent domain cases and in situations where the Turnpike Acts have expressly imposed liability but has not rejected the general immunity of the Commis-

sion recognized in the *Ewalt* case, supra. Nothing in the *Lichtenstein* decision, written by the same judge who wrote the opinions in the *Ewalt* and *Valley Forge Gardens* cases, eliminates this immunity.

(c) *The law requires Federal Courts to recognize the immunity accorded to the Commission by State Courts.*

Although the Supreme Court of Pennsylvania has not ruled on the Commission's tort liability for personal injuries, the Federal Courts are not without authoritative expressions of the law of Pennsylvania. This question has been directly decided by Courts of Common Pleas in Pennsylvania in a consistent manner over a course of 18 years. These cases state the law of Pennsylvania and the Federal Courts should accept their interpretation of Pennsylvania law.

The question of the nature of State Court Decisions which would be binding on the Federal Courts has received considerable attention by this Court since *Erie Railroad Co. v. Tompkins*, supra. In *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940), this Court held the Court of Appeals for the Third Circuit in error for failing to accept a decision of the New Jersey Court of Chancery as stating the law of New Jersey. The Court of Chancery was the equity trial court and possessed state-wide jurisdiction. Appeals from that Court were taken directly to the New Jersey Court of Errors and Appeals. It was stated at pages 177 and 178:

"We think that this ruling was erroneous. The highest state court is the final authority on state law

(Beals v. Hale, 4 How. 37, 54; Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. See Ruhlin v. New York Life Insurance Co., 304 U.S. 202, 209. An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. We have declared that principle in West v. American Telephone & Telegraph Co., post, p. 223. It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law.

"Here, the question was to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute. That construction and effect are shown by the judicial action through which the State interprets and applies its legislation. That judicial action in this instance has been taken by the Chancery Court of New Jersey and we have no other evidence of the state law in this relation."

and at page 180:

> "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. In the absence of any contrary showing, the rule of the Thatcher and Travers cases appears to be the one which would be applied in litigation in the state court, and whether believed to be sound or unsound, it should have been followed by the Circuit Court of Appeals."

And in *Six Companies of California v. Joint Highway District No. 13 of California*, 311 U.S. 180 (1940), this Court reversed the affirmance by the Court of Appeals for the Ninth Circuit of the decision of the District Court. The District Court refused to follow a decision by the California District Court of Appeals and made an independent determination of the law of California. This Court held that the decision of the California District Court of Appeals stated the law of California because the Supreme Court of California had not indicated its disapproval and (page 188) "there is no convincing evidence that the law of the State is otherwise."

This principle was expanded further in *West v. American Telephone and Telegraph Company*, 311 U.S. 223 (1940), in which this Court held that the Court of Appeals for the Sixth Circuit erred in refusing to accept as the law of Ohio a decision of the Cuyahoga County Court of Appeals which the Ohio Supreme Court had refused to review. This Court said at pages 236-238:

> "A state is not without law save as its highest court has declared it. There are many rules of de-

> cision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts. See Erie Railroad Co. v. Tompkins, supra, 78; Russell v. Todd, supra, 203."

In *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940), this Court reversed the Court of Appeals for the Eighth Circuit for failing to follow a decision of the Kansas City Court of Appeals in the absence of convincing evidence that the Supreme Court of Missouri would decide the question differently.

These cases have clearly announced the duty of the Federal courts to ascertain the applicable state law from the available sources and have prohibited independent examination of state law where there are authoritative statements of state law available.

Examination of the decision of this Court in *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1947), indicates that the decisions of the Pennsylvania state courts, discussed in subsection (a) above,

should be accepted by the Federal courts as the law of Pennsylvania. The opinions in the Pennsylvania county court cases cited are published and are readily available to the bench and bar. Shepard's Pennsylvania Citations contains sections devoted to county legal journals and examination thereof will reveal that County Courts, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania make frequent reference to county decisions in their Opinions. The county decisions involved have been relied upon by other county courts and have not been rejected by any Pennsylvania court on the question of personal injury liability.

The Courts of Dauphin County, in addition to their other duties, sit as a Commonwealth Court enjoying state-wide jurisdiction of cases in which the Commonwealth is a party plaintiff: Act of April 18, 1870, P. L. 57 §1, 17 P.S. 255, as amended. These courts also enjoy exclusive jurisdiction with respect to actions in equity and mandamus against officers, departments, boards, commissions or instrumentalities of the Commonwealth: Act of May 26, 1931, P. L. 191, §2, 12 P.S. 105 and Pennsylvania Rules of Civil Procedure, Rules 1092 and 1503. Further all appeals from the Pennsylvania Board of Finance and Revenue are directed by statute to the Court of Common Pleas of Dauphin County: Act of July 13, 1957, P. L. 838, §14, 72 P.S. 1104, as amended. The Dauphin County Court of Common Pleas was vested with exclusive state-wide venue by Section 6(c) of the Pennsylvania Turnpike Philadelphia Extension Act to hear cases such as the present case. No Pennsylvania State Court has questioned the validity of this exclusive state-wide venue. In the *DiRenzo* case, supra, Judge Bok, now Justice Bok of the Pennsylvania Supreme Court, recognized the proper venue as being in Dauphin County.

The fact that in no case decided by the County Courts has the plaintiff taken an Appeal to the Supreme Court of Pennsylvania indicates acceptance by the Pennsylvania bar of these rulings as correctly stating the law of Pennsylvania. The opinions of the Dauphin County Court are entitled to a consideration that was not accorded by the Court of Appeals.

The authority to be accorded to the decisions of inferior state courts has been the subject of considerable discussion in the lower Federal Courts. Some of these cases will be briefly discussed below.

Gustin v. Sun Life Assurance Co. of Canada, 154 F. 2d 961 (6 Cir., 1946), certiorari denied 328 U.S. 866, held that the District Court correctly followed an unreported decision of the Court of Appeals of Cuyahoga County, Ohio.

In *Duling v. Markun*, 231 F. 2d 833 (7 Cir. 1956), certiorari denied, 352 U.S. 870, it was held that, while the defendant was not bound by the Decree entered by the West Virginia Trial Court when he was not personally served in that proceeding, the opinion of that court was entitled to "great respect" and should have been followed citing the *King* case, supra.

Circuit Judge Hand concluded in *Robles v. Folsom*, 239 F. 2d 562 (2 Cir. 1956), certiorari denied, 353 U.S. 960, that the question of legitimacy in New York had been decided by Surrogate's Court on three occasions and that these decisions should be followed. He distinguished the *King* case, supra, and found that the facts were analogous to the facts in the *Fidelity Union Trust Co.* case, supra.

In *Lattavo Bros. v. Hudock*, 119 F. Supp. 587 (D.C. W.D. Pa., 1953), *affirmed* without opinion, 347 U.S. 910,

Circuit Judge Staley, sitting as District Court, considered himself bound by one decision of the Court of Common Pleas of Dauphin County concerning statutory construction.

Blackman v. Govern, 138 F. Supp. 884 (D.C. N.J. 1956), holds that the District Court was required to follow the determination of New Jersey law as pronounced by two trial court cases.

And in *Masse v. Pennsylvania Turnpike Commission*, 163 F. Supp. 510 (D.C. E.D. Pa. 1958), Judge Kraft discussed the *House and Frye* and *Malpica* cases, supra, and held that these cases may be fairly regarded as a consensus or, at least, indicative of the state rule of decision and should be followed.

Application of the rule enunciated by this Court in its prior decisions required that the Court of Appeals accept the Pennsylvania County Court decisions as supplying the rule of decision in this case. Particularly appropriate is the language of this Court in *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198 (1955), at pages 202 and 203:

> "* * * We deal here with a right to recover that owes its existence to one of the States, not to the United States. The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is, as we said in Guaranty Trust Co. v. York, 326 U.S. 99, 108, in substance 'only another court of the State.' The federal court therefore may not 'substantially af-

fect the enforcement of the right as given by the State.' Id., 109. If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought."

If the decision of the Court of Appeals is allowed to stand, the anomalous situation will arise in which personal injury suits will be dismissed by Pennsylvania State Courts but will be allowed to go to trial in Federal District Courts. Thus the outcome of this type of litigation will depend upon the courthouse in which suit is brought rather than the consistent application of the Pennsylvania law as required by the Rules of Decision Act and *Erie Railroad Company v. Tompkins*. The accidental factors of diversity of citizenship and amount in controversy will become the determinative factors in future personal injury suits against the Pennsylvania Turnpike Commission.

2. Exclusive Venue Is in Dauphin County

The General Assembly of the Commonwealth of Pennsylvania by Section 6(e) of the Pennsylvania Turnpike Extension Act, restricts the institution of actions against the Commission to the Dauphin County Courts. That section provides:

> "The commission may sue and be sued in its own name, plead and be impleaded: Provided, however, That any and all actions at law or in equity against the commission shall be brought only in the proper courts at the county of Dauphin."

The Pennsylvania County Courts have accepted the above section as the law of Pennsylvania and have held that personal injury actions against the Commission must be brought in Dauphin County. See: *DiRenzo v. Trans-*

american Freight Lines, Inc., 10 Pennsylvania District and County Rep. 2d 723 (1957); *Harrell v. Porter*, 19 Pennsylvania District and County Rep. 2d 385 (1958).

Pennsylvania may validly limit actions against its instrumentalities to state courts. This Court has flatly held that such a limitation is valid: *Great Northern Insurance Company v. Reed*, 322 U.S. 47 (1944); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Note the recent language of Mr. Justice Douglas in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) at pages 276 and 277:

> "* * * The conclusion that there has been a waiver of immunity will not be lightly inferred. Murray v. Wilson Distilling Co., 213 U.S. 151, 171. Nor will a waiver of immunity from suit in state courts do service for a waiver of immunity where the litigation is brought in the federal court. Chandler v. Dix, 194 U.S. 590, 591-592. And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts. Cf. Delaware River Comm'n v. Colburn, 310 U.S. 419."

The Court of Appeals interpreted Section 6(c) of the Pennsylvania Turnpike Philadelphia Extension Act as providing that suit could be brought in any court sitting in Dauphin County. This conclusion is contrary to the above-cited County Court decisions and ignores the reason for the limitation. As was stated in *Petition of Becker*, 4 Pennsylvania District and County Rep. 2d 294 (1955), at pages 301 and 302:

"Mere convenience of physical inspection would not be a controlling factor. It is apparent that other countervailing and even more important sound reasons of policy lie behind the mandatory venue requirements. The very question here raised, the alleged abuse of discretion by the commission, obviously would not be resolved by an inspection of the property. Undoubtedly, the determination of that subject would also involve consideration of such matters as planning, design, engineering data, executive decisions and many other such factors, most of which would depend upon files, records, minutes and other documents, available only at the commission's headquarters or upon the testimony of policy-making and high-ranking officials or employes constantly engaged in carrying out current functions there. Quite different problems of judgment and discretion would be involved than in the mere inquiry into questions of compensation for fixed and predetermined parcels of realty, the only matter clearly left to local courts. In short, the conduct of a State-wide enterprise of the magnitude of the Pennsylvania Turnpike ought not to be hampered by the enforced absence of possible key records or personnel while involved in protracted judicial proceedings in localities distant from its base of operations, unless such result clearly must obtain. Here, however, the appropriate statute definitely indicates a contrary legislative intention."

To allow suit in the United States District Court for the Middle District of Pennsylvania could defeat this purpose by allowing actions to be tried outside of Dauphin County and thus interrupt vital functions of the Commission.

The Pennsylvania Turnpike Philadelphia Extension Act validly limits venue in such suits as are maintainable against the Commission to the Courts of Dauphin County and precludes actions in the United States District Court for the Middle District of Pennsylvania.

CONCLUSION

The variance in result between the Federal Courts and the Pennsylvania Courts on the important issue of the tort liability of the Pennsylvania Turnpike Commission for personal injuries requires the exercise of the supervisory powers of this Court. It is respectfully requested that this Honorable Court exercise its discretion and cause a writ of certiorari to issue to the United States Court of Appeals for the Third Circuit.

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Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 13,119

Stanley Gerr and Carl Gerr, a Minor by Stanley Gerr, His Guardian,

Appellants

v.

Harry William Emrick and Pennsylvania Turnpike Commission

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued April 20, 1960

Before Biggs, *Chief Judge* and Goodrich and Kalodner, *Circuit Judges*

OPINION OF THE COURT

(Filed October 10, 1960)

By Kalodner, *Circuit Judge*

Is the Pennsylvania Turnpike Commission endowed with the attributes of the sovereign immunity of the Commonwealth of Pennsylvania with respect to actions for

personal injuries and property damage on the Commission's alleged negligence in the contruction, operation or maintenance of the Pennsylvania Turnpike?

That is the primary question presented by this appeal from the Order of the United States District Court for the Middle District of Pennsylvania which answered it in the affirmative and dismissed the action.[1]

The issue is novel in the sense that the precise question has never been decided by the appellate courts of Pennsylvania and that being so we are required to consider such approach to the problem as may be indicated by the Pennsylvania cases in the general field and to

[1] The action was brought on behalf of the minor plaintiff, Carl Gerr, and his father, plaintiff Stanley Gerr, to recover damages for injuries sustained by Carl as the result of an automobile accident on the Philadelphia Extension of the Pennsylvania Turnpike. The negligence of the Pennsylvania Turnpike Commission is alleged to have been its failure to erect a guard rail at the point where the car operated by Carl went off the Turnpike after collision with a vehicle operated by the defendant Harry William Enrick. Jurisdiction was based on a diversity of citizenship—the plaintiffs are citizens of Connecticut, defendant Enrick is a citizen of Illinois and the Pennsylvania Turnpike Commission is a citizen of Pennsylvania. In its Answer to the Complaint the Commission averred as its "First Defense" lack of jurisdiction on the part of the District Court "because it [the action] is in substance and effect against the Commonwealth of Pennsylvania, which has not consented to be sued or waived its immunity from suit." The Commission also argued in the court below, as it does here, that assuming absence of immunity the Commission could be sued only in the Dauphin County (Pennsylvania) Courts. The District Court did not reach the latter contention and dismissed the action as to the Commission on the ground of its immunity from suit. It further entered an Order in accordance with Rule 54 (b) of the Federal Rules of Civil Procedure expressly determining that there was no just reason for delay in the entry of a final judgment of dismissal as to the Commission and this appeal followed.

resort to general applicable principles to reach a conclusion consistent with Pennsylvania law.[2] In sum, it is incumbent on us to make our own determination of what the Pennsylvania Supreme Court would probably rule in a similar case.[3]

There have been a number of cases in the Common Pleas Courts and Federal District Courts in Pennsylvania in which the question of immunity of the Pennsylvania Turnpike Commission in negligence cases was at issue.

The Common Pleas Courts of Pennsylvania—three in Dauphin County,[4] two in Allegheny[5] and one in Philadelphia,[6] all have held that the Commission is endowed with the sovereign immunity of the Commonwealth of Pennsylvania and hence not subject to liability in negligence cases.

The District Court for the Eastern District of Pennsylvania agreed with the view of the Pennsylvania Common Pleas Courts in one case[7] and disagreed with it in

---

[2] Since jurisdiction in the instant case is based on diversity of citizenship, Erie v. Thompkins, 304 U.S. 64 (1938) requires us to apply Pennsylvania law.

[3] Bittner v. Little, 270 F. 2d 286, 288 (3 Cir. 1959); Davis v. Smith, 253 F. 2d 286, 289 (3 Cir. 1958); Aetna Casualty & Surety Co. v. DeMaison, 213 F. 2d 826 (3 Cir. 1954); Continental Assurance Co. v. Conroy, 209 F. 2d 539 (3 cir. 1954).

[4] House v Pennsylvania Turnpike Commission, 45 D. & C. 677 (1942); Malpica v. Pennsylvania Turnpike Commission, 65 Dauphin 302 (1953) and Saper v. Pennsylvania Turnpike Commission, 19 D. & C. 2d 372 (1959).

[5] Caputo v. Pennsylvania Turnpike Commission, 103 Pitts. L.J 486 (1955) and Harrell v. Porter, 19 D. & C. 2d 385 (1958).

[6] DiRienzo v. Transamerican Freight Lines, Inc., 10 D. & C 2d 723 (1957).

[7] Eastern Motor Express, Inc. v. Espenshade and Pennsylvania Turnpike Commission, 138 F. Supp. 426 (E.D. Pa. 1956), decided by Judge Lord.

another.[8] The District Court for the Western District of Pennsylvania disagreed with the Pennsylvania Common Pleas Courts.[9]

The sum of the lower court opinions holding the Pennsylvania Turnpike Commission immune from suit in negligence actions is that the Commission is "an instrumentality of the Commonwealth" engaged in the performance of "an essential governmental function" and accordingly is endowed with the attributes of the sovereign immunity of the Commonwealth of Pennsylvania.

The contrary view expressed in the two federal district court decisions is premised on their holding that the Pennsylvania Turnpike Commission is "a separate entity" distinct from the Commonwealth of Pennsylvania and that the latter is not the "real party in interest."

On the score of the lower Pennsylvania court decisions we need only say that we do not deem them to represent such a "consensus" of nisi prius opinion as to require us to defer to their holding,[10] particularly in view of recent rulings and expressions therein of the Supreme Court of Pennsylvania.

We find an illuminating guide towards the decision of the issue here presented in Lichtenstein v. Pennsylvania Turnpike Commission, 398 Pa. 415 (1960) and are moved by it to conclude that the Pennsylvania Supreme Court would hold that the Commission is not immune from actions premised on its negligent construction, operation or maintenance of the Pennsylvania Turnpike.

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[8] Masse v. Pennsylvania Turnpike Commission, 163 F. Supp. 510 (E.D. Pa. 1958), decided by Judge Kraft.

[9] Linger v. Pennsylvania Turnpike Commission, 158 F. Supp. 900 (W.D. Pa. 1958), decided by Judge Miller.

[10] Eckman v. Baker, 224 F. 2d 954 (3 Cir. 1955).

In Lichtenstein v. Pennsylvania Turnpike Commission it was held that where the Commission condemns and enters upon land and a board of viewers awards the landowner damages the Commission is liable for interest on the award. Of special significance is the fact that in so holding the Pennsylvania Supreme Court expressly overruled its earlier decision in Pennsylvania Turnpike Commission v. Smith, 350 Pa. 355 (1944) insofar as that case equated the Commission with the Commonwealth in respect of liability for interest on claims against it.

In overruling the Smith case the Court said (pp. 419-420):

> "Nothing could be clearer than that claims against the Turnpike Commission are not chargeable to the Commonwealth. Yet, the above quoted statement from the *Smith* case plainly implies that the liabilities of the Turnpike Commission do not bear interest because the Commission is, in effect, the *alter ego* of the Commonwealth which is not liable for interest. This conclusion was reasoned from the fact that the Act of May 21, 1937, P. L. 774, No. 211, 36 PS §652a et seq., which created the Turnpike Commission, constituted it 'an instrumentality of the Commonwealth', performing 'an essential governmental function of the Commonwealth'. But, equally so is every legislatively ordained municipal corporation, school district or political subdivision. School districts especially afford notable examples of instrumentalities of the Commonwealth engaged in the performance of an essential governmental function, the responsibility for the discharge whereof is laid primarily on the Commonwealth by the Constitution, which declares that the General Assembly shall provide for the maintenance and sup-

port of a thorough and efficient public school system. Art. X, Section 1. Certainly, no one can justifiably contend that, under the Act of 1929, as amended, governmental instrumentalities, such as school districts, municipalities and other political subdivisions are not liable for interest on awards of viewers for damages for property taken under the power of eminent domain; and no meritorious reason is apparent why the Act of 1929, as amended, is not also applicable to the Pennsylvania Turnpike Commission. . ."

"In the *Culver* case, supra [Culver v. Commonwealth, 348 Pa. 472 (1944)], it was said that to make the Commonwealth liable for interest, the legislature would expressly have to so declare, the *rationale* being that, without such legislative declaration, the Commonwealth is free from liability for interest because of its sovereign immunity. But, it would be carrying this particular immunity beyond justifiable limits, to extend it to an instrumentality of the Commonwealth, created for the performance of an essential governmental function, where liability for the principal sum involved resulted from the appropriation by the instrumentality, under its power of eminent domain, of private property for use in the furtherance of the public purpose for which the instrumentality was created. . ."

It seems clear from the foregoing that the Supreme Court of Pennsylvania in Lichtenstein did not subscribe to the concept of the Pennsylvania Common Pleas Courts that the Pennsylvania Turnpike Commission is the alter ego of the Commonwealth of Pennsylvania, and that its status as an "instrumentality of the Commonwealth" and the fact that it was engaged in the performance of "an

essential governmental function" endow it with the sovereign immunity of the Commonwealth.

It is also clear from what was decided and said in Lichtenstein that the Pennsylvania Turnpike Commission occupies the status of a "legislatively ordained municipal corporation, school district or political subdivision" and as such is suable for negligence in the discharge of its legislatively assigned functions to construct, operate and maintain the Pennsylvania Turnpike. It is settled in Pennsylvania that municipalities or political subdivisions may be sued for negligent maintenance of their highways. Clark v. Allegheny County, 260 Pa. 199 (1918); Camp v. Allegheny County, 263 Pa. 276 (1919); see generally 17 Pa. Law Ency., Highways §81.

The holding in Lichtenstein that the Commission is not the *alter ego* of the Commonwealth is in consonance with what was earlier said in Gitlin v. Pennsylvania Turnpike Commission, 384 Pa. 326 (1956). There the Court in disposing of the contention that the Commission as an instrumentality of the Commonwealth was endowed with its sovereignty stated (p. 330):

"The Commission is not the Commonwealth."

Of interest is the recent case of Pennsylvania Turnpike Commission v. County of Fulton, 143 Legal Intelligencer 71 (Common Pleas Court Fulton Co. 1960) where it was held that land acquired by the Commission in connection with the acquisition of a right of way but not actually used for Turnpike purposes was subject to county taxes. The opinion writer was Judge Sheely who had written the first of the Common Pleas Court decisions—House v. Pennsylvania Turnpike Commission, supra—holding the Commission to be immune from suits for negli-

gence on the ground that as an "instrumentality of the Commonwealth" performing a governmental function it was endowed with the sovereignty of the Commonwealth.

In Pennsylvania Turnpike Commission v. County of Fulton, Judge Sheely said:

> ". . . it is also true that the Act of May 21, 1937, P. L. 774, 36 PS §652a et seq., which created the Turnpike Commission, constituted it 'an instrumentality of the Commonwealth' performing 'an essential governmental function of the Commonwealth,' but it does not follow that the Turnpike Commission is thereby vested with all the immunities of the Commonwealth. This was expressly decided in Lichtenstein v. Pennsylvania Turnpike Commission, 398 Pa. 415 (1960) . . . It was specifically held that the Turnpike Commission was not, in effect, the alter ego of the Commonwealth."

In view of the foregoing we are of the opinion that the Pennsylvania Supreme Court would hold that the Pennsylvania Turnpike Commission may be sued for negligence in the construction, operation and maintenance of the Turnpike.

There remains for disposition the contention of the Commission that if suable it must be sued in the "proper courts at the county of Dauphin" under Pennsylvania law. In doing so it points to the following provision in the Pennsylvania Turnpike Act:

> "The Commission may sue and be sued in its own name, plead and be impleaded: Provided, however, That any and all actions at law or in equity against the commission shall be brought only in the proper

courts at the county of Dauphin." Act of May 16, 1940, Extra Sess., P. L. 949, §6, 36 P.S. §653c(c).

The Commission urges that should this Court find a "waiver" of the immunity of the Commission, such "waiver", by virtue of the above quoted proviso, has been limited to actions brought in the state courts in Dauphin County, relying upon Kennecott Copper Corp. v. State Tax Comm., 327 U.S. 573 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great Northern Ins. Co. v. Read, 322 U.S. 47 (1944). The plaintiffs, however, contend that a state is without the power to deprive a federal court of its otherwise proper diversity jurisdiction by restricting suit against the state-created entity to state courts, where, as here, they argue that entity is deemed separate and distinct from the state. Lincoln County v. Luning, 133 U.S. 529 (1890); Louisiana Highway Comm. v. Farnsworth, 74 F. 2d 910 (5th Cir. 1935), cert. den. 294 U.S. 729. Plaintiffs further contend that the Kennecott, Ford Motor and Read cases, supra, are inapposite "since their rulings are restricted to fiscal claims against the State on State taxation matters. . ."

We find it unnecessary to decide this very interesting issue as posed by the parties. See Markham v. City of Newport News, 184 F. Supp. 659 (E.D. Va. 1960); Hart & Wechsler, The Federal Courts and the Federal System 609 (1953); Note, Waiver of State Immunity to Suit With Special Reference to Suits in Federal Courts, 45 Mich. L. Rev. 348 (1947). As we have already determined that a suit against the Commission is not a suit against the Commonwealth, the problems raised by the Kennecott, Ford Motor and Read cases, supra, in ascertaining whether a state has limited its consent to suit in state courts is

not here present. The Commission is a "citizen" of a state for purposes of diversity of citizenship jurisdiction of the federal courts. Suit was brought in the United States District Court for the Middle District of Pennsylvania. The Middle District of Pennsylvania includes Dauphin County. The United States District Court for the Middle District of Pennsylvania is one of the "proper courts at the county of Dauphin". Therefore the statutory provision has been complied with and we need not determine what its effect would be had suit been brought in the United States District Court for the Eastern District of Pennsylvania, see Eastern Motor Express, Inc. v. Espenshade, supra, or had the statute purported to expressly limit suit against the Commission to a state court, see Lincoln County v. Luning, supra.

For the reasons stated the Order of the District Court will be reversed and the cause remanded for proceedings not inconsistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960
No. 627

PENNSYLVANIA TURNPIKE COMMISSION,
Petitioner

v.

STANLEY GERR and CARL GERR, a Minor by STANLEY GERR, His Guardian,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

IN THE
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October Term, 1960

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Memorandum and Order of the United States District Court for the Middle District of Pennsylvania entered October 20, 1959, is set forth in the record (R. 11a). The Order and Judgment of the United States District Court for the Middle District of Pennsylvania entered November 24, 1959, is set forth in the record (R. 16a).

Jurisdiction

The Opinion of the Court of Appeals for the Third Circuit, filed October 10, 1960, is set forth in the record and is printed in the Appendix to the Petition for Writ of Certiorari (Appendix pp. 24-33).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. In the absence of any decision by the Appellate Courts of Pennsylvania on the precise question of tort liability of the Turnpike Commission, is a Court of Appeals bound to follow the decisions of inferior courts of the state, which held the Commission immune from tort liability for its negligence in the construction and maintenance of its turnpike, on the principle that the Commission was the alter ego of the Commonwealth and thus inherently endowed with all the Commonwealth's governmental immunity, where subsequently the Pennsylvania Supreme Court rules that the Commission is not the Commonwealth, is not the alter ego of the Commonwealth, and is not endowed with all the immunities of the Commonwealth?

2. Where the State statute provides for venue of actions against the Pennsylvania Turnpike Commission to "the proper courts at the county of Dauphin", may such a suit be maintained in the United States District Court for the Middle District of Pennsylvania, which includes Dauphin County?

STATUTES INVOLVED

The pertinent provisions of the Rules of Decision Act (62 Stat. 944, 28 U.S.C. 1652) and of the Pennsylvania Turnpike Philadelphia Extension Act (36 Purdon's Statutes, Sec. 653d) are set forth in the Petition at page 4.

STATEMENT OF THE CASE

Respondents are of the opinion that no further statement of the history and facts of the case is necessary in addition to those adequately set forth on pages 5 and 6 of the Petition.

ARGUMENT CONTRA PETITION

The issues in the present case are narrow and restricted, and do not present a situation where an important State question is being decided by the Court of Appeals in conflict with the applicable State law, as contended by the Petitioner. Neither does this case involve the determination of any important federal question, nor the interpretation or application of any federal statute or law. It is the contention of Respondents that the decision of the Court of Appeals is clearly correct under the applicable law of Pennsylvania; and that there is no conflict with any decisions of the State courts since the most recent expressions of the Pennsylvania Supreme Court.

I. The Decision of the Court of Appeals Is Clearly Correct

The precise issue as to the tort liability of the Pennsylvania Turnpike Commission for damages resulting from its alleged negligent construction and maintenance of its turnpike has never been before the appellate courts of Pennsylvania. However, several Common Pleas Courts have considered the matter and have held the Commission immune from such liability; all such holdings being based on the principle and rationale that, since the Commission was an "instrumentality" of the Commonwealth and its duties "governmental", and because it was in substance the arm and alter ego of the Commonwealth, the Commission therefore inherently possessed the Commonwealth's

sovereign immunity. The decisions of the inferior courts so holding, as cited and discussed by the Petitioner on pages 8, 9, and 10 of its Petition for Writ of Certiorari, were all decided *prior* to any expressions by the Supreme Court of Pennsylvania as to the validity of the stated principle upon which the decisions were based.

It has consistently been the law of Pennsylvania that other governmental "instrumentalities", such as municipalities and other political subdivisions, even though performing essential "governmental" functions, were suable for negligence in their discharge of their statutory functions of construction and maintenance of their highways: *Collins v. Commonwealth*, 262 Pa. 572, 580, 106 A. 229 (1919); *Clark v. Allegheny County*, 260 Pa. 199, 103 A. 552 (1918); *Camp v. Allegheny County*, 263 Pa. 276, 106 A. 314 (1919); *Hartness v. Allegheny County*, 349 Pa. 248, 37 A. 2d 18 (1944). Consequently, unless the Turnpike Commission was the alter ego of the Commonwealth with all its immunities, it likewise would be subject to liability for the negligent manner in which it performed its statutory duty of constructing, operating, and maintaining the turnpike.

When these inferior courts held the Commission immune they did not have the benefit of the recent expression of the Pennsylvania Supreme Court, as declared in *Lichtenstein v. Pennsylvania Turnpike Commission*, 398 Pa. 415, 158 A. 2d 461 (1959). Consonant with its previous holding in *Gitlin v. Pennsylvania Turnpike Commission*, 384 Pa. 326, 121 A. 2d 79 (1956), that "the Commission is not the Commonwealth.", the attitude of the Pennsylvania Supreme Court became evident from its most recent cases involving the Turnpike Commission. In *Pennsylvania*

Turnpike Commission v. Smith, 350 Pa. 355, 39 A. 2d 139 (1955), interest on an award by arbitrators against the Turnpike Commission for constructive fraud based on a contract was denied on the basis that the *State* was not liable for interest in the absence of statute or contractual agreement, and because the Turnpike Act did not require the *Commonwealth* to pay interest under the circumstances of the case. The effect of this holding was to place the Turnpike Commission on a par with and equal to the Commonwealth itself simply because it was an instrumentality of the Commonwealth performing a governmental function. However, the holding and rationale of this case was expressly overruled by the *Lichtenstein* case in the following language:

> ". . . The Smith case plainly implies that the liabilities of the Turnpike Commission do not bear interest because the Commission is, in effect, the *alter ego* of the Commonwealth . . . reasoned from the fact that the Act of May 21, 1937, . . . constituted it 'an instrumentality of the Commonwealth', performing 'an essential governmental function of the Commonwealth.' . . . the Smith case . . . is herewith overruled *so far as its holding equates the Turnpike Commission with the Commonwealth* in respect of liability for interest on claims against it." (pp. 419, 420) (Italics ours.)

Analogizing the Turnpike Commission with other political subdivisions, the *Lichtenstein* case further states:

> "Nothing could be clearer than that claims against the Turnpike Commission are not chargeable to the Commonwealth." (p. 419)

The latest pronouncements of the Supreme Court of Pennsylvania having thus unequivocally enunciated the

doctrine that the Commission is *not* the alter ego of the Commonwealth, and does *not* possess the immunities of the Commonwealth, justified the decision of the Court of Appeals that the Commission is liable to suit for the negligent manner in which it carries out its mandated purpose of construction and operation of a toll highway, in accordance with established rule of law of Pennsylvania so holding as to other legislatively created public governmental bodies, and which rule of law Petitioner does not even controvert.

II. The Court of Appeals Properly Ascertained the Applicable State Law and Was Not Bound To Follow the Previous Decisions of the Inferior Courts of Pennsylvania

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The gist of Petitioner's argument is that since the Appellate Courts of Pennsylvania have not decided the precise question, the Court of Appeals was bound to follow the rules of decisions of the several State inferior courts, and it was not free to consider subsequent expressions of the Pennsylvania Supreme Court as evidencing the probable correct rule of law. The Court of Appeals in its opinion recognized its duty to determine and apply Pennsylvania law (p. 26, Appendix to Petition for Writ of Certiorari), and its refusal to follow the rule of decision of the inferior courts was not because it thought these rules unsound in principle or that another principle was preferred, but because:

> ". . . in view of recent rulings and expressions therein of the Supreme Court of Pennsylvania . . . we . . . are moved . . . to conclude that the Pennsylvania Supreme Court would hold that the Commission is not

immune from actions premised on its negligent construction, operation, or maintenance of the Pennsylvania Turnpike." (p. 27, Appendix to Petition for Writ of Certiorari)

Petitioner argues to deny the Court of Appeals the right to consider from (1) subsequent and (2) appellate court decisions convincing evidence that the State law is not as previously decided by the Common Pleas Courts, and in view thereof, to make its own determination of what the Pennsylvania Supreme Court would probably rule on the precise question. This argument is in direct conflict with the quotations from several cases of this Court as set forth in the Petition for Writ of Certiorari. In *West v. American Telephone and Telegraph Company*, 311 U.S. 223 (1940) (quoted on page 16 of the Petition), this Court said:

". . . it is the duty of the former (federal courts) in every case to ascertain *from all the available data* what the State law is . . ." (Italics ours.)

Similarly, in *Six Companies of California v. Joint Highway District No. 13 of California*, 311 U.S. 180 (1940) (quoted on page 15 of the Petition for Writ of Certiorari), this Court stated that a Court of Appeals was bound to follow State law as enunciated by an inferior State Court where the Appellate Court had not indicated its disapproval and ". . . there is no convincing evidence that the law of the State is otherwise." (p. 188). In spite of these rulings, Petitioner in the instant case argues that the Court of Appeals should be required to accept Pennsylvania county court decisions as supplying the rule of decision for this case, *even where subsequently the Supreme Court of Pennsylvania overrules the underlying principle and rationale*

on which these inferior courts based their rulings! To merely state this argument is to expose its fatal weakness and error.

The determination of the Court of Appeals in the instant case that:

> "It seems clear from the foregoing that the Supreme Court of Pennsylvania in Lichtenstein did not subscribe to the concept of the Pennsylvania Common Pleas Courts. . ."

was a finding it not only had a right to make, but a duty to do so, and its action in so doing is strictly in accordance with the decisions of this Court, and is without error.

III. The Statutory Limitation for Actions Against the Commission Is One of Venue Only

---

The single point that the Petitioner urges as a constituting jurisdictional error is that the instant action was not triable in the United States District Court for the Middle District of Pennsylvania, which includes Dauphin County, and in which county that Court sits regularly and holds sessions. Petitioner's contention is set forth on page 20 of its Petition, wherein it argues that the relevant section of the Turnpike Act restricts the institution of actions against the Commission *to* the Dauphin County Courts. Petitioner then proceeds to quote from the Act (p. 20 of Petition) which provides that actions against the Commission shall be brought "only in the proper courts *at* the County of Dauphin". We respectfully submit that Petitioner has committed a "prepositional" error, since the

limitation in the act is one of venue only, and authorizes actions against the Commission in those courts properly sitting *at* the County of Dauphin. We need not be concerned with the validity of any attempted State-statutory limitation to the courts of the State for suits against itself, or any of its legislative public bodies, since the quoted portion of the Pennsylvania Turnpike Act has no such limitation. We again quote from one of the decisions of this Court cited in the Petition for Writ of Certiorari, page 19, where it is stated:

> "Yet, in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is . . . in substance 'only another court of the State'."
>
> *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 202, 203 (1955).

It is respectfully submitted that the Court of Appeals properly concluded that the instant suit, instituted and maintained in the United States District Court for the Middle District of Pennsylvania, which includes and sits in the County of Dauphin, was in full compliance with the statutory limitation of venue.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SOLOMON HURWITZ,

MACEY E. KLEIN,

Counsel for Respondents.

FILE COPY

In The

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v.

STANLEY GERR and CARL GERR, a Minor by
STANLEY GERR, His Guardian,
Respondents

PETITIONER'S REPLY BRIEF

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IN THE
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PETITIONER'S REPLY BRIEF

ARGUMENT

Respondents state on page 6 of their Brief that the decisions of the Common Pleas Courts relied upon by the Petitioner were all decided prior to and without the benefit of the case of *Lichtenstein v. Pennsylvania Turnpike Commission*, 398 Pa. 415 (1959). On February 6, 1961, subsequent to the filing of the Petition for Writ of Certiorari and the filing of Respondents' Brief, the Court of Common Pleas of Dauphin County, in the case of *Charles A. Rader et al. v. Pennsylvania Turnpike Commission*, No.

549 Commonwealth Docket, 1959, notwithstanding the *Lichtenstein* case, supra, and the opinion of the United States Court of Appeals for the Third Circuit in the present case, reaffirmed its position that the Pennsylvania Turnpike Commission is an instrumentality of the Commonwealth engaged in the performance of a governmental function and immune from tort liability. Sufficient time has not elapsed at the date of the writing of this Reply Brief to permit the publication of this Opinion in the usual legal reporters. Accordingly, a copy of the Opinion is printed in the Appendix hereto.

The Dauphin County Court in reaffirming its prior holdings carefully considered the *Lichtenstein* case and concluded that the decision in that case in no way indicated a rejection of the immunity from tort liability of the Turnpike Commission as recognized by the Common Pleas Courts of Pennsylvania and the Supreme Court of Pennsylvania in *Ewalt v. Pennsylvania Turnpike Commission*, 382 Pa. 529 (1955), where the Court stated ". . . the immunity which the appellee (Turnpike Commission) thus imputes to itself may be conceded! . . ." (parenthesis supplied).

The Dauphin County Court also considered the Opinion of the United States Court of Appeals for the Third Circuit in the instant case, and in rejecting that Court's conclusion pointed out that ". . . it would indeed be difficult to get a better consensus of *nisi prius* opinion than we now have . . .".

CONCLUSION

The very recent decision of the Court of Common Pleas of Dauphin County in the *Rader* case reaffirms the uniform opinions of the lower Courts of Pennsylvania interpreting the Pennsylvania Turnpike Acts so as to afford immunity from tort liability to the Turnpike Commission. The *Rader* decision rejects the contrary conclusion of the United States Court of Appeals for the Third Circuit. It is imperative that this [illegible] of opinion be resolved. It is therefore respectfully requested that this Honorable Court exercise its discretion and grant the relief prayed for in the Petition for a Writ of Certiorari.

Respectfully submitted,

GEORGE H. HAFER,

JAMES K. THOMAS,

Counsel for Petitioner.

HENRY E. HARNER,

Of Counsel.

APPENDIX

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PA.

No. 549 Commonwealth Docket, 1959

Charles A. Rader; Shirley C. Rader; Charles A. Rader, Jr., a minor, by his guardian, Charles A. Rader; and Debra S. Rader, a minor, by her guardian, Charles A. Rader

v.

Pennsylvania Turnpike Commission

OPINION

By the Court:

We have before us here the identical question that was before this Court in 1942, in *House, Frye v. Pennsylvania Turnpike Commission*, 53 Dauphin 38; again in 1953, in *Malpica v. Pennsylvania Turnpike Commission*, 65 Dauphin 302; and again in 1959, in *Supa et al. v. Pennsylvania Turnpike Commission*, 73 Dauphin 387. The same question was also before the Common Pleas Courts of Allegheny County in *Caputo v. Pennsylvania Turnpike Commission*, 103 Pitts. L. J. 486 (1955); in *Harrell v. Porter*, 19 D. & C. 2d 385 (1958), and in Philadelphia County in *Di Renzo v.*

Transamerican Freight Lines, Inc., 10 D. & C. 2d 723 (1957).

In all of these cases the question presented was: Is the Pennsylvania Turnpike Commission immune from liability for alleged negligence in the construction, maintenance, and operation of the Pennsylvania Turnpike? And in all of these cases the Courts answered the question in the affirmative. In fact, we have been unable to find a single Pennsylvania case during the 24 years of the Commission's existence imposing such liability and we see no good reason for departing from the rule so definitely established by the cases cited.

Plaintiffs have alleged in their amended complaint that they suffered personal injuries as a result of an accident which occurred on the Pennsylvania Turnpike in Franklin County, which location places the accident within the area embraced by the original Turnpike Act (Act of May 21, 1937, P. L. 774, No. 211, § 1, 36 P.S. 652a et seq.). Plaintiffs aver that the Pennsylvania Turnpike Commission was negligent in permitting ice to accumulate on the roadway, in failing to spread abrasive material thereon, and in failing to post signs warning of the icy condition and restricting speed of the motorists. As a result of this negligence, plaintiffs further aver that the automobile in which they were riding was thrown into a skid and struck a guard rail.

The Pennsylvania Turnpike Commission filed a preliminary objection, in the nature of a demurrer, on the ground that the Commission, as an instrumentality of the Commonwealth of Pennsylvania, engaged in the performance of an essential governmental function, is immune from this liability.

In the *House, Fry* case, supra, Judge Sheely, of the 51st Judicial District, specially presiding in Dauphin County, in a well-considered and exhaustive opinion, holding, at page 43, that the Turnpike Commission ". . . is not liable for the torts of its agents or employees under the doctrine of respondeat superior," pointed out that the Act creating the Pennsylvania Turnpike Commission stated that its purpose was to facilitate vehicular traffic between the eastern and western sections of the Commonwealth of Pennsylvania; that the Commission was constituted an instrumentality of the Commonwealth, and that the powers conferred on the Commission by the Act, in the construction, operation, and maintenance of the Turnpike should be deemed and held to be an essential governmental function of the Commonwealth; that, four of the five members of the Commission are appointed by the Governor, by and with the advice and consent of the Senate, and the fifth member is the Secretary of Highways, who serves ex officio; that the members of the Commission are required to take the oath prescribed by Article VII of the Constitution of the Commonwealth; that construction contracts are required to be approved by the Department of Highways, and that all construction must be supervised by the Department; that the Commission was granted the right of eminent demain and was authorized to issue bonds which were to be signed by the Governor and the Chairman of the Commission, and which should be free from taxation.

Judge Sheely further pointed out, at page 40, that:

". . . Section 11 also provides: 'The accomplishment by the Commission of the authorized purposes stated in this Act being for the benefit of the people of the Commonwealth and for the improvement of

> their commerce and prosperity, in which accomplishment the Commission will be performing essential Governmental functions, the Commission shall not be required to pay any taxes or assessments on any property acquired or used by it for the purposes provided by this act. . . ."

To these attributes of the Turnpike Commission enumerated by Judge Sheely, we might add that a Turnpike Commissioner has been held to be a public officer[1]; the Turnpike itself has been held to be a "State Highway"[2]; that, in acquiring property for the Turnpike Commission, the *Commonwealth* was acquiring the same through its agent, the Commission[3] and; that the State Mining Commission has authority to determine the amount of coal to be left in place and the compensation to be paid for said coal under the Pennsylvania Turnpike, as well as under other State Highways.[4]

In the *House, Frye* case, supra, Judge Sheely reasoned, and we believe correctly so, that the Commonwealth itself had a perfect right to construct the Turnpike, and if it had done so it would not have been liable for negligence of its servants. Having determined to build it through an agency such as this, which is clearly not a municipality or a political subdivision, and delegating to it all the powers necessary to construct as well as to operate the Turnpike, but relieving itself entirely of any financial

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[1] *Commonwealth v. McSorley*, 189 Pa. Superior Ct. 223 (1959).

[2] *Transamerican Freight Lines v. Commonwealth*, 396 Pa. 64 (1959).

[3] *Pennsylvania Turnpike Commission Land Condemnation Case*, 347 Pa. 643 (1943).

[4] *Pennsylvania Turnpike Commission Appeal*, 351 Pa. 139 (1945).

responsibility in connection therewith, there should likewise be no liability for such negligence. The effect of the Act, of course, is that the Commonwealth will eventually acquire the Turnpike without binding itself to the cost thereof or assuming any responsibility in connection therewith.

President Judge Smith of this Court, in *Malpica v. Pennsylvania Turnpike Commission*, supra, followed Judge Sheely's lead and also held the Commission immune from tort liability.

Judge Sohn of this Court, in *Super et al. v. Pennsylvania Turnpike Commission*, supra, in a most able and comprehensive opinion, reviewed all the decisions on the subject and agreed with the earlier cases that there was no tort liability on the Commission. Judge Sohn there reasons also that the Pennsylvania Supreme Court in *Ewalt v. Pennsylvania Turnpike Commission*, 382 Pa. 529 (1955), by clear implication, approved the Dauphin County Court's rulings on this subject when Mr. Justice Jones (now Mr. Chief Justice) said, at page 535, in pointing out that the Commission contended that the Commonwealth's immunity from liability for damages due to injuries from a continuing trespass also attended the Commission, ". . . *The immunity which the appellee* (Turnpike Commission) *thus imputes to itself may be conceded*[5] . . ." (parenthesis supplied)

In the *Ewalt* case, damages were allowed against the Commission but only because Section 6(k) of the Western Pennsylvania Turnpike Extension Act (Act of June 11, 1941, P. L. 101, 36 P.S. 654e), under which the action was

[5] Emphasis throughout ours unless otherwise indicated.

brought *expressly imposed the liability there sued upon.* For the type of injury involved in the *instant* case there is no liability on the Turnpike Commission, expressed or implied.

The *Ewalt* case was considered not only by Judge Solin, in the *Super* case as we have shown above, but also by Judge Bok (now Mr. Justice Bok of the Pennsylvania Supreme Court), in *Di Renzo v. Transamerican Freight Lines, Inc.*, supra, where he interpreted the *Ewalt* case as had Judge Solin; by Judge Soffel, in *Harrell v. Porter*, supra, who said, at page 391:

> "The Ewalt decision established the rule that, except as otherwise expressly provided by statute, the Commission is immune from liability for negligent acts of its employes . . ."

and, finally, by Mr. Justice Jones again, in *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, 385 Pa. 477 (1956). There the present Chief Justice said, at page 495, in speaking about the *Ewalt* case:

> ". . . We held that the Commission was liable for the proven consequential damages because the Western Pennsylvania Turnpike Extension Act of 1941, P. L. 101, under which that section of the turnpike was constructed, *expressly charged* the Commission with the payment of compensation for property damaged or destroyed by the construction, operation and maintenance of the turnpike. . ."

We are satisfied that Mr. Justice Jones was eminently correct in saying as he did in the *Ewalt* case that the immunity of the Commonwealth which the Commission there imputed to itself might be conceded.

Plaintiffs rely heavily on *Lichtenstein v. Pennsylvania Turnpike Commission*, 398 Pa. 415 (1959), as showing, by implication, how the Pennsylvania Supreme Court would hold on the question of the liability of the Turnpike Commission for negligence of its employees if and when the matter were squarely before it. They say that the Appellate Court would certainly hold the Commission liable. We disagree with this conclusion, and incidentally, with the same conclusion reached by the United States Court of Appeals for the Third Circuit, in the case of *Gerr v. Emrick and Pennsylvania Turnpike Commission*, 283 F. 2d 293 (1960), which we will later consider.

The *Lichtenstein* case holds simply that the Turnpike Commission is liable for interest on an award of viewers for land taken by the Commission under its power of eminent domain—nothing more. And this holding is amply supported by legislation and by Section 10 of Article I of the Pennsylvania Constitution.

Section 6 of the Turnpike Commission Act (36 P.S. 652f) outlines the procedure to be followed by the Commission in the condemnation of land and provides that payment for such lands taken shall be only from funds provided by the Act, and further provides that the court having jurisdiction of the proceeding ". . . may make such orders as may be *just* to the Commission and to the owners of the property to be condemned. . ."

The Act of April 25, 1929, P. L. 777, as amended (26 P.S. 43), provides that:

> "The amount of damages allowed in a report of viewers for the taking, injury or destruction of property by the exercise of the right of eminent domain shall, as finally confirmed, bear interest at the rate of

six per centum per annum from the date of the filing of the report."

In the closing paragraph of the *Lichtenstein* case, after considering the immunity of the *Commonwealth* for interest on claims against it, Mr. Chief Justice Jones said, at page 420:

". . . But, it would be carrying this *particular* immunity beyond justifiable limits to extend it to an instrumentality of the Commonwealth, created for the performance of an essential governmental function, *where liability for the principal sum involved resulted from the appropriation by the instrumentality, under its power of eminent domain, of private property for use in the furtherance of the public purpose for which the instrumentality was created.* Indeed, it might well be questioned whether the legislature could constitutionally deprive a property owner of interest for delay in a condemnor's payment of an award made for property so taken. The Pennsylvania Constitution expressly provides that private property shall not be taken for public use unless *just* (Emphasis theirs) compensation to the owner be first made or secured: Article I, Section 10. And, this Court long ago recognized that, in constitutional contemplation, the compensation must be *just* (Emphasis theirs) 'at the time its amount is settled': Klages v. Philadelphia & Reading Terminal Co., 30 Pa. 386, 390, 28 A. 862. No lengthy reflection is needed in order to realize that the justness of such compensation is impaired by each day's delay in the payment of the award."

We do not believe that this holding in the *Lichtenstein* case, in any way indicates that the Supreme Court meant

to say that the Turnpike Commission is now no longer immune from tort liability, especially in view of the fact that the writer of this Opinion also, only five years earlier, wrote the *Ewalt* Opinion, in which he said, albeit by way of dicta, that the immunity which the Turnpike Commission there sought to impute to itself could be conceded.

This same question has been before the Federal Courts in all three districts of Pennsylvania and there was no unanimity among them. In 1954, in *Lowes v. Pennsylvania Turnpike Commission*, 125 F. Supp. 681, Judge Follmer, in the Middle District, held that the Commission was not immune from suit in a negligence case. In 1956, in *Eastern Motor Express, Inc. v. Espenshade and Pennsylvania Turnpike Commission*, 138 F. Supp. 426, Judge Lord, in the Eastern District, likewise found no immunity. Then, in 1958, there were two cases: the one, *Linger v. Pennsylvania Turnpike Commission*, in the Western District, reported in 158 F. Supp. 900, in which Judge Miller found the Turnpike liable for the torts of its agents; and the other, *Masse v. Pennsylvania Turnpike Commission*, in the Eastern District, reported in 163 F. Supp. 510, in which Judge Kraft said, at page 511, "... After careful analysis we reach the conclusion that Ewalt v. Pennsylvania Turnpike Commission ... supplies the rule of decision that, except as otherwise expressly provided by statute, the Commission is immune from liability for negligent acts of its employees ..." and found no liability there for personal injuries resulting from an accident. Finally, the same question again came before Judge Follmer in the Middle District Court, in 1959, in the case of *Gerr v. Emrick and Pennsylvania Turnpike Commission*, Civil Action No. 5776, and he found that there was no tort liability on the Commission. This last case was appealed to

the Circuit Court of Appeals for the Third Circuit, where Circuit Judge Kalodner, in an opinion reported in 283 F. 2d 293 (1960), reversed the District Court and held the Commission was not endowed with the immunity of the Commonwealth for this type of injury.

Although the decision of the Federal Appellate Court on this question is not binding upon us, it certainly warrants the most careful consideration and we have examined it closely before arriving at our conclusion.

The Circuit Court, in finding that the Turnpike Commission is not immune from liability, says that there is not such a "consensus" of *nisi prius* opinion as to require that Court to defer to such opinion; and, that the *Lichtenstein* case affords an "illuminating guide" to point the way the Pennsylvania Supreme Court will go on a similar set of circumstances.

We should point out that it would indeed be difficult to get a better consensus of *nisi prius* opinion than we now have when it is considered that in all of the nine Turnpike Extension Acts the Court of Dauphin County is the only one in which suits against the Commission may be brought, and that, since Dauphin County is the county in which the seat of the State Government is located and in which the principal office of the Turnpike Commission is also located, it is quite likely that most, if not all, cases similar to the present one will have their origin in Dauphin County.[6]

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[6] The collision which resulted in the House, Frye case and that in the Malpica case, as well as in the instant case, occurred in counties other than Dauphin, but the actions were brought in Dauphin County. In the Caputo case which was begun in Allegheny County, the question as to venue was raised but not considered because other preliminary objections were sustained. The

The Dauphin County Court has previously held on three different occasions, as we pointed out earlier in this Opinion, that the Turnpike Commission is immune from tort liability and the cases from other counties, even though perhaps by way of dictum, have agreed.

As to the effect of the *Lichtenstein* case, we have hereinbefore pointed out what we believe the Supreme Court meant to say and it does not persuade us to overrule our earlier decisions in the matter.

To hold that there is no immunity here would subject the Turnpike Commission to innumerable lawsuits with claims, no matter how groundless, running into millions of dollars and it is conceivable that the security of the four hundred million dollars of Turnpike bonds outstanding, all of which were, of course, sold to the investing public with the belief that there was no such liability as here sought to be imposed, might be seriously jeopardized.

Nor do we believe that the instant case is controlled in any way by the cases that hold that *municipalities* or *political subdivisions* may be sued for negligent maintenance of their highways. "The truth seems to be, as pointed out in Ford v. Kendall Borough School District, 121 Pa. 543, 549, 15 A. 812, 816, and Scibilia v. Philadelphia, 279 Pa. 549, 555, 124 A. 273, 275, that the imposition of liability for negligence in failing properly to maintain highways stems more from historic reasons and long-established precedent than from legal consistency or logic." *Hartness v. Allegheny County*, 349 Pa. 248, 251 (1944).

Di Renzo case and the Harrell v. Porter case involved extensions of Turnpike Acts and the cases determined that Dauphin County was the proper forum.

The Turnpike Commission is not a municipality nor a political subdivision but an *instrumentality* of the Commonwealth, created for the performance of *one* essential governmental function. As pointed out in *House, Frye v. Pennsylvania Turnpike Commission*, supra (and concurred in by *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, supra, where the instrumentality was the State Highway and Bridge Authority), the Pennsylvania Turnpike Commission is more like an *agency* of the Commonwealth and the doctrine of respondeat superior should not be extended to this type of instrumentality. (See also *Carlo v. Scranton School District*, 319 Pa. 417 (1935)).

We believe, and so hold, that the Pennsylvania Turnpike Commission is such an instrumentality of the Commonwealth and engaged in such performance of a governmental function as to be immune from liability for the torts of its servants.

ORDER

AND NOW, this 6th day of February, 1961, the demurrer of the defendant, Pennsylvania Turnpike Commission, filed as a preliminary objection to the amended complaint, is hereby sustained and judgment is entered in favor of the defendant, Pennsylvania Turnpike Commission and against the plaintiffs, Charles A. Rader; Shirley C. Rader; Charles A. Rader, Jr., and Debra S. Rader.

R. Dixon Herman
Judge

Feby 7, 1961

Certificate

I hereby certify that the foregoing is a true and correct copy of the original filed to No. 549 C.D. Term, 1959.

RUSSEL G. HUMMEL
Prothonotary.